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FOURTH SESSION

Friday, April 29, 1921, 8:30 o'clock, p. m.

The Society met at 8:30 o'clock p. m., Hon. ROBERT LANSING, presiding. Chairman LANSING. The program of the evening covers the reports of the Subcommittees of the Committee for the Advancement of International Law, and I will ask Mr. Charles Noble Gregory to make the report for Subcommittee No. 1.

Mr. GREGORY read the following report:

REPORT OF SUBCOMMITTEE NO. 1

To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.

To the American Society of International Law:

Your committee, to which this work was assigned about a month prior to the meeting of the Society, at which its report was due, fully realizes that the preparation of a complete report would involve the arduous labor of a force of competent scholars and secretaries for a period of years. They have attempted no such impossible achievement. At the wise suggestion of Dr. James Brown Scott, Secretary of the Society and Chairman of the Program Committee, they took for present consideration as most plainly within the purview of their assignment, the rules of International Law most directly involved in the Report of the Commission of Responsibilities of the Conference of Paris of 1919 as to "The violation of the Laws and Customs of War." This report deals with the violation of neutral territory, and cites summary examples of offense by the Central Powers against the law of war under thirty-two heads.

Taking the above topics and regarding them as a mere beginning of a long labor, there is submitted a brief and tentative statement of the rules of International Law whose breach was so found and reported. The provisions which rest upon the sole authority of the Hague Conventions are by the terms of those conventions (the regulations as to Laws and Customs of War on Land), not to apply except between contracting Powers and then only if all the belligerents are parties to the convention (Article 20). As to Naval Regulations (in Scott's texts) there is a like provision (Article 18). In the main, however, these regulations merely codified and restated rules already widely received and, among more enlightened peoples, generally recognized as existing and obligatory. Regulations for the government of armies in the field issued by various governments were in the main in accord with them, and your committee is unable to consider the enlightened progress of international law, a great department of unwritten law, as abolished and

wholly replaced by the provisions of the Hague Convention with the serious limitation above indicated. They regard these conventions, except as to minor and specific rules, as merely declaratory of the best and most widely accepted views of the world upon these subjects in 1899 and 1907 from which there had been no departure on August 1, 1914.

With this preamble, they respectfully submit statements of the rules of international law upon the topics above as they conceive them to have existed at the date last mentioned.

VIOLATION OF NEUTRAL TERRITORY

The right of a sovereign state to remain neutral in case of war is incontestable. The territory of a state which remains neutral in time of war is inviolable by any belligerent. No act of hostility is to be committed therein, nor can the same be used as a base for hostile operations. Belligerents must respect the above rights.

A neutral country may repel by necessary force any attempted violation of its neutrality, and the use of such force is not a hostile act.

A neutral nation is bound to use all its available force to prevent a violation of its neutrality. If a neutral country consents to the violation of its territory by one belligerent, or fails to prevent the same in so far as it is able, it is a grave offence against the opposing belligerent and may expose the neutral nation to treatment by such other belligerent as one having forfeited its neutrality and become itself a belligerent. It may also be the basis for the recovery of damages.

The nationals of a neutral may furnish merchandise, including munitions of war, to a belligerent without violating the laws of neutrality.

The neutral nation, however, violates its neutrality if its government furnishes or sells to a belligerent munitions of war or in any way aids it against the other belligerent, or if it permits the enlistment of men or augmentation of equipment of vessels of war within its territory.

Partiality in thought and feeling alone is no breach of neutrality. Mere acts of humanity and charity, though extended only to one belligerent, are not a breach of neutrality.

Neutrality involves no cessation of intercourse with belligerents.

The stay of belligerent warships in neutral waters and aid or assistance to them by repairs, coaling, supplying, etc., is limited as to parties to such covenants by the Conventions of the Hague Conference of 1907.

A neutral Power must not allow belligerents to move troops or convoys of either munitions of war or supplies across its territory.

Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

They are likewise forbidden (a) to erect in the territory of a neutral Power a wireless telegraphy station or other apparatus for the purposes of communicating with belligerent forces on land or sea; (b) to use any installation of the kind established by them before the war on the territory of a neutral Power for purely military purposes and which has not been opened for the service of public messages.

Corps of combatants can not be formed nor recruiting agencies opened in the territory of a neutral Power to assist the belligerents.

A neutral Power is not called upon to punish acts in violation of its neutrality unless the said acts have been committed in its own territory.

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Contracts for the sale or furnishing of articles contraband of war made in neutral territory to a belligerent are lawful and will be enforced by courts of justice.

A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless apparatus belonging to it or to companies or private individuals.

Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles VII and VIII of the Hague Convention of 1907 must be impartially applied to both belligerents.

A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

A neutral state which has not broken faith may demand the same respect as in time of peace. It is presumed that it will observe a strict neutrality and will make no declarations and do no acts contrary to such obligation of impartiality. This rule is important as to passes, commissions and credentials issued by such neutral state. It is a presumption in favor of innocent and lawful conduct to which a neutral state is entitled.

MURDERS AND MASSACRES, SYSTEMATIC TERRORISM

"A non-combatant is a resident of a belligerent state who takes no part in the war. He is not subject to the laws of war, and is protected by them, in his person and property, so long as he refrains from participation in military operations" (Geo. B. Davis, *Elements of International Law* (1908), p. 312).

"Family honor and rights, the lives of individuals and their private property, as well as their religious convictions and the right of the public are to be respected. Private property is not to be confiscated."

It is forbidden to kill or injure enemies except in the exercise of acts of war or as a punishment for crime. Murders, treacherous killings, massacres and terrorism are not allowed by the laws of war.

"Unnecessary or revengeful destruction of life is not lawful."

"Assassination and the killing and wounding by treachery of individuals belonging to the hostile nation or army, are not lawful acts of war (citing Hague Rules 23 (b)) and the perpetrator of such acts has no claim to be treated as a combatant, but should be put on his trial as a war criminal."

"As a consequence of the prohibition of assassination, the proscription or outlawing of any enemy or the putting of a price on an enemy's head or any offer for an enemy 'dead or alive' is not permitted."

Non-combatants "so long as they refrain from all hostilities, pay the military contribution which may be imposed on them and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country . . . are allowed to continue in the enjoyment of their property and in the pursuit of their ordinary avocations."

"But this exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants or such as refrain from all acts of hostility."

Non-combatants who take up arms or incite others to do so within occupied territory are exposed to the full rigor of the law of war.

If a commander of belligerent forces has good reason to mistrust the inhabitants of any place, he may disarm them and require security for good conduct.

"He may lawfully retain them as prisoners either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even women and children may be held in confinement if circumstances render such a measure necessary in order to secure the just objects of the war."

In the absence of just cause such restraints may be censured.

"Murder by treachery of individuals belonging to the hostile nation or army" is forbidden. (Brussels Declaration, 1874, Art. 12, 2 Halleck, p. 21, note.)

"Private citizens are no longer murdered, enslaved or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."

"Those who lay aside their peaceful avocations and engage either directly or indirectly in hostile acts towards the enemy, whether by the orders of their government, or their own free will, are liable to the consequences which lawfully result from such acts, but to none other."

It is prohibited "to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." (Art. 23, Regs. Hague Conv. IV (1907).)

PUTTING HOSTAGES TO DEATH

Hostages must be treated as prisoners of war, and for whatever purpose seized or accepted may not be put to death, and any such act is wholly unlawful however the giver of the hostage may fail in fulfilling his pledge. Hostages may not be placed in places of danger as a shield or a protection from acts of war against a belligerent.

"Any proceeding of rigor against a hostage, even if he be forcibly seized in time of war, beyond what may be necessary for the security of his person, is illegal and a violation of the laws of war."

As a prisoner of war, a hostage is to be treated according to rank and condition as circumstances admit. He is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace by cruel imprisonment, by want of food, by mutilation, death or any other barbarity."

DELIBERATE STARVATION OF CIVILIANS

"The lives of individuals are to be respected" (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI).

But "War is not carried on by armies alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy" (7, Moore's Digest, 179).

The deprivation of belligerents or civilians of food as a result of a siege or a blockade or the lawful destruction of ships or means of transport, even to the point of starvation, is lawful, provided it is incident to an operation of war to subdue or reduce military resistance.

TORTURE OF CIVILIANS

"The lives of individuals are to be respected" (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI).

Non-combatants in territory occupied by a belligerent are protected by the laws of war both in their person and property, except that they are subject to restraint and regulations required by the safety of the belligerent and that their property is subject to reasonable requisitions and contribution. So long as they conduct themselves peaceably and lawfully, they are not subject to further penalty or to torture or cruel treatment. Torture or cruelty to non-combatants who have conducted themselves peaceably or to prisoners of war conducting themselves lawfully are contrary to the laws of war and are forbidden.

RAPE

Family honor and rights, the lives of individuals . . . are to be respected. (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI.)

Grotius declares of rape "that the act has no tendency either to security or to punishment, and therefore ought to be no more unpunished in peace than in war. This latter rule is the law of nations, and the rule not of all but of the best." (Grotius, *De Jure Belli ac Pacis*, Vol. III, Ch. IV, Sec. XIX, p. 94.) And further, "And it is fit that this rule should be observed by Christians, not only as a part of military virtue, but as a part of the law of nations, that is, that he who violates a woman, even in war, shall be everywhere liable to punishment."

The violation or attempted violation of women in time of war is forbidden by the law of nations, and should be punished as a capital breach of the law of war when committed under such circumstances that the law of war is applicable. In territories governed by municipal law only the punishment is left to that branch of law.

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking the place by main force, all rape, wounding, maiming or killing of such inhabitants are prohibited under the penalty of death or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private in the act of committing such violence and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior. All war crimes are liable to be punished by death, but more lenient penalty may be pronounced. Corporal punishment is excluded and cruelty in any form must be avoided. (Sub. 450, p. 97, Edmunds and Oppenheim, *Land Warfare*.)

ABDUCTION OF GIRLS AND WOMEN FOR PURPOSES OF ENFORCED PROSTITUTION

Family honor and rights, the lives of individuals . . . are to be respected. (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI.)

The persons of non-combatants are protected, and any injury to them, except as an incident to operations of war otherwise lawful or as a punishment for crime or war treason, is unlawful and an offence against the law of war.

The abduction of women and girls by the military force or authority for the purpose of prostitution violates the above provisions and is an offence against the law of war and, like such crimes in general, may be punished by death.

DEPORTATION OF CIVILIANS

International conventions as well as authorities on international law are wholly silent on the question as to the right of an invader, a military occupant, or a conqueror to deport the civilian population of invaded, occupied, or conquered territory.

But the Hague Convention on the Laws and Customs of War on Land (see Arts. 43 and 46), expressly recognizes an obligation on the part of the belligerent to "respect family honor and rights," as also to "respect, unless absolutely prevented, the laws in force in the country." It likewise declares that "neither requisitions nor services can be demanded from communes or inhabitants except for the needs of the army of occupation (Art. 52).

The only possible justification for any policy of deportation of any part of the civilian population of an occupied territory would seem to be a great and pressing danger necessitating on the part of the occupying belligerent, the "taking all steps in his power to re-establish and insure, as far as possible, public order and safety" (Art. 43 of the Hague Rules of Land Warfare). But these dangers requiring such extreme measures must needs be real and imminent, not imaginary or remote.

INTERMENT OF CIVILIANS UNDER INHUMAN CONDITIONS

Westlake (Int. Law, Part II, p. 42) thus states the customary rule as it existed prior to the outbreak of the World War: "Modern international law forbids making prisoners of the persons, or confiscating the property of enemy subjects in the territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the state, refusing them the right of continued residence during good behavior." The discussions at the Second Hague Conference disclose the fact that it was then considered inadmissible to imprison enemy subjects at the outbreak of war.

"Owing, however, to the recent introduction of universal military service on the continent of Europe, there has been a growing disposition to recognize the right of belligerents to detain males liable to such service, in order to prevent them from returning home and enlisting in the enemy's army." (Garner, Int. Law and the World War, I, pp. 58-59.)

While there seems to be no precedent for such wholesale measures or policies of general internment of civilians as were adopted by European governments during the World War, there had been a growing tendency to justify the practise of internment of non-combatants when military commanders might deem such measures necessary or advisable. Thus, Benton (Int. Law and Diplomacy of the Spanish American War, pp. 27-31) justifies General Weyler's reconcentration policy in

principal, though he condemns it from the standpoint of method and expediency. He says (p. 28): "It was a military measure perfectly lawful in itself, provided the Spanish authorities could fulfill the corresponding obligation to protect the persons forced from their homes and could supply them with food."

Lord Kitchener was severally criticized for the establishment of concentration camps during the Boer War in South Africa in 1901. "Yet," says Spaight, "despite faults of management and administration, the concentration camps were a notable effort to deal humanely with a civil population who were the victims of a necessary military policy of devastation." (War Rights on Land, p. 310.)

According to the same publicist (*ibid.*, p. 307), concentration camps are defined as

internment camps for non-combatants. They have been violently attacked on the ground that the laws of war do not permit of the inoffensive inhabitants of a hostile country, old men, women, and children, being made prisoners. Generally speaking, the objection taken to such camps is sound in principle. Article 46 of the *Règlement* inculcates respect for "family honors and rights, the lives of individuals and private property," and it is an interference with this war right of non-combatants to remove them from the home and intern them in military camps. Such an extreme measure is only to be justified by very extreme circumstances; in fact, by such circumstances as make concentration not only imperatively necessary for the success of the responsible belligerents' operations, but also the less of two evils for the inhabitants themselves.

The establishment of concentration camps for the internment of non-combatants or civilians is a subject upon which leading authorities seem to differ but they certainly can not be justified under inhuman conditions.

PILLAGE

The pillage of a town or place, even when taken by assault, is prohibited. (See Russian Instructions, Art. LL, 1904, German War Book, p. 107; Edwards and Oppenheim, Art. 138; Lieber's Inst. U. S., Art. 44; Austro-Hungarian Manual, 1913. All collected in Laws of Land Warfare, p. 217, supporting and in accord above.)

The pillage of a town or place captured or occupied by a belligerent, even when taken by assault, is prohibited. Such pillage is a breach of the law of war and may be punished by death or other penalty. Officers in command of troops are bound to use their authority and to take all precautions to prevent the same and on failure to do so may be held liable therefor. A superior officer observing any soldiers under his command committing an act of pillage must order them to desist, and if they disobey, he may lawfully kill them on the spot.

The prohibition of pillage does not extend to booty or spoils of war, which latter include arms, equipment, uniforms, horses, army stores and supplies and public money. Pillage is a term applied to the taking by force, and not by way of contribution or requisition, of private property in war.

CONFISCATION OF PROPERTY

It is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" (Art. 23, Regs. Hague Conv. IV, 1907).

Movable property of individuals is inviolable on land, except in case of military necessity and except that the same is subject to requisitions and contributions, but with the exception stated below herein.

The taking or the carrying away of the same, subject to the exception above, by members of a hostile force is regarded as criminal robbery and subject to be punished accordingly. By the law of war private property must be respected unless it falls within the exception herein stated.

"An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the state, which may be used for military operations."

All appliances, whether on land or at sea or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms and generally all kinds of munitions of war, may be seized even if they belong to private individuals, but must be restored and compensation fixed when peace is made." (Art. 53, Regs. Hague Conv. IV, 1907.)

The restrictions of the above articles do not apply to movable property found on the battle-field which may be appropriated.

EXACTION OF ILLEGITIMATE OR EXHORBITANT CONTRIBUTIONS AND REQUISITIONS

Contributions and requisitions are permitted by the law of war to a belligerent occupying the country of an enemy, over and above taxes for the expenses and administration of the occupied territory. If the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Such contributions are limited exclusively to the needs of the army or of local administration, and all extortion or levy or collection for other purposes is forbidden.

All levies and executions must be reasonable and proportioned to the resources of the district or persons assessed.

The collection of fines by a belligerent is, in addition to the above contributions and requisitions, also allowed. Fines, in the law of war, are particular forms of extraordinary contribution consisting of collections of sums of money by the occupant for the purpose of checking acts of hostility. Such fines can only be levied in consequence of reprehensible or hostile acts committed by the community as a whole or at least permitted by it to be committed. Acts strictly of individuals can not give rise to collective punishment or penalty as to a community. The occupant may not levy contributions for the purpose of enriching himself or his government or for the general support of his government. Contributions can only be collected on the responsibility of a commander-in-chief and under a written order. (See Art. 51, Hague Conv. IV, 1907.)

The collection of contributions shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force. For every contribution a receipt shall be given to the contributor. Receipts are given to afford means of proof of payments

in order that other commanders may not make fresh impositions not knowing the levies already made. Also to facilitate recourse by the persons making payments to their own government if, on making peace, it determines to spread the loss suffered over the nation at large. They imply no promise to pay on the part of the occupant.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. (Article 52, Regs. Hague Conv. IV, 1907.)

"The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct" (Art. 55, Regs. Hague Conv. IV, 1907).

"The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when state property, shall be treated as private property." All seizure of, or destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." (Art. 53, Regs. Hague Conv. IV, 1907.)

The protection above given to private property and to municipal property and to that devoted to religion, charity, education and the arts and sciences, applies only during military occupation. If the same is injured incidentally owing to operations of war in themselves lawful, this is no breach of the laws of war and imposes no liability. Such exemptions as apply to property dedicated to religion, charity, education and the arts and sciences, apply also to the right of capture at sea.

COLLECTIVE PENALTIES

"No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals, for which it can not be regarded as collectively responsible." (Art. 50, Annex to Hague Conv., 1907.)

DELIBERATE BOMBARDMENT OF UNDEFENDED TOWNS

"The attack or bombardment by whatever means, of towns, villages, dwellings or buildings, which are undefended, is prohibited." (Art. 25, Hague Conv. IV, 1907.) The rules as to naval bombardment are believed to be in substantial agreement with the above.

DESTRUCTION OF MERCHANT SHIPS WITHOUT WARNING

The destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew, is

forbidden, except when such ships either resist or attempt to escape capture. In such cases, during such resistance or attempt any force necessary to subdue and capture the vessel may be used against her without reference to the safety of those on board. Such right ceases when any vessel abandons the attempt to resist or to escape and submits peaceably to capture. The above rules apply to both neutral and belligerent merchant and passenger ships. They are not altered by the fact that such ships are transporting in the way of commerce, munitions of war. Nor are they altered by the fact that such ships are armed solely for purposes of defense.

In that connection, the subcommittee has attached as an exhibit the carefully prepared rules for the government of our naval forces in war, issued by the Navy Department of the United States in 1917.¹

COAST FISHING VESSELS

"Vessels used exclusively for fishing along the coast, or small boats employed in local trade, are exempt from capture, as well as their appliances, rigging, tackle and cargo. . . . They cease to be exempt as soon as they take any part whatever in hostilities. . . . The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance." (Art. III, Hague Conv. 1907.)

The above exemption applies to vessels bringing in fresh fish, but not to those bringing in salted or cured fish.

Vessels charged with religious, scientific or philanthropic missions are likewise exempt from capture. (Art. IV, Hague Conv. 1907.)

WANTON DESTRUCTION OF RELIGIOUS, CHARITABLE, EDUCATIONAL AND HISTORIC BUILDINGS AND MONUMENTS

"In sieges and bombardments all necessary steps must be taken to spare as far as possible buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand. (Art. 27, Regs. Hague Conv. IV, 1907.)

Any military use of the edifice by the besieged (for instance, placing an observer therein) justifies its destruction by the besieger.

ATTACK ON AND DESTRUCTION OF HOSPITAL SHIPS

Military hospital ships, that is to say, ships constructed or adapted by states specially and solely with the view of aiding the sick, wounded and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement and during the course of hostilities and in any case before they are employed, shall be respected and can not be captured while hostilities last. These ships, moreover,

¹ *Infra*, p. 116.

are not on the same footing as warships as regards their stay in neutral ports. (3d Hague Conv. 1899, 10 Hague Conv. 1907, 1.)

"Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities and in any case before they are employed. These ships must be provided with a document from the proper authorities declaring that the vessels have been under their control while fitting out and on final departure" (Art. 2, 2d Hague Conv. 1899, 3d Hague Conv. 1907, 1). Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries shall be respected and exempted from capture, *on condition that they are placed under the control of one of the belligerents, with the previous consent of their own government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case before they are employed* (3d Hague Conv. 1899, and Hague Conv. 1907, 1). The facts that the staff on a hospital ship are armed to preserve order or to defend the sick or wounded or that wireless telegraphic apparatus is aboard are no reasons for withdrawing the protection of the Hague Convention from such ship.

BREACH OF RULES RELATING TO THE RED CROSS AND TO TREATMENT OF SICK AND WOUNDED AND DOCTORS, NURSES AND ATTENDANTS CARING FOR THEM

"The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention" (Art. 21, Regs. Hague Conv. IV, 1907; Art. 1, Chap. I, Geneva Convention).

Article 1. Officers, soldiers and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for without distinction of nationality by the belligerent in whose power they are.

Article 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners, become applicable to them.

These obligations of parties may be modified by mutual agreement.

Article 9. The personnel charged exclusively with the removal, transportation and treatment of the sick and wounded, as well as with the administration and establishments and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

Article 12. Persons described (as above) will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power. . . . When their assistance is no longer indispensable they will be sent back to their army or country within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms and horses as are their private property.

Chapter VI continues, "Out of respect to Switzerland the heraldic emblem of the Red Cross on a white ground, formed by the reversal of the federal colors," as the emblem and distinctive sign of the sanitary service of armies.

If military penal laws are insufficient, signatory governments undertake to take or to recommend to their legislatures the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpation of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

It is forbidden "To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." (Art. 23, Hague Conv. IV, 1907.)

Use of the Red Cross badge is governed by the above provision; and covering transports of munitions therewith, not medical stores, or a hospital train used to facilitate the escape of combatants or firing on the enemy from a place or vehicle or conveyance protected by such badge or symbol, or using any place or structure protected by such symbol as an observatory or military office or store, or for any acts of hostility, are unlawful and forbidden.

POISON

It is forbidden "To employ poison or poisoned weapons." (Art. 23, Regs. Hague Conv. IV, 1907.)

The above prohibition applies to the use of poisonous gases to injure an enemy or the civil population.

"The contracting parties agree to abstain from the use of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases." (Hague Decl. 1899.)

"It is not thought justifiable to use chemical compounds which may maim or torture the enemy." (Dana's Wheaton, p. 428, note 166.)

"But the laws of nations, if not all, at least of the best, have long been, that it is not lawful to kill an enemy by poison" (Grotius, *De Jure Belli ac Pacis*, Vol. 3, Ch. 4, XV, p. 86).

"To employ arms, projectiles or materials calculated to cause unnecessary suffering" is forbidden (Art. 28, Regs. Hague Conv. 1907).

DIRECTIONS TO GIVE NO QUARTER

It is forbidden "*To declare that no quarter will be given*" (Art. 23, Regs. Hague Conv. IV, 1907).

The rule is the same without the above declaration, but there are exceptions, namely, quarter may be refused for violations of the rules of warfare committed by the other side, and also in case of imperative necessity. Inability to feed and guard prisoners is not such necessity. The garrison and inmates of a fortress or place attacked and which is carried by assault, even though they have obstinately and uselessly defended against an overwhelming force, are entitled on surrender to receive quarter.

It is forbidden to declare that no quarter will be given, and on the

other hand, quarter can not lawfully be refused to an enemy who ceases to resist and gives up his arms. Except that quarter may be denied to an enemy who has personally violated the laws of war, who has declared his intention of refusing to grant quarter or of violating those laws in any grave manner, or whose government or commander has done acts which justify "such a reprisal," "or in case of imperative necessity" (See Oppenheim, Vol. 2, p. 147). But the fact that numerous persons can not safely be guarded and fed by the captors does not furnish a case of such necessity, provided that no vital danger to the captors is therein involved.

The fact that a fortress, a force or garrison unceasingly and uselessly defends against artillery or overwhelming forces and that the same are carried or captured by assault will not warrant the refusal of quarter to such force or garrison. Prisoners who can not safely be kept may be disarmed and liberated. They may not upon the chances of rescue be put to death.

PRISONERS OF WAR

"Prisoners of war are in the power of the hostile government, but not of the individual or corps who capture them. . . . They must be humanely treated. . . . All their personal belongings, except arms, horses and military papers, remain their property." (Art. 4, Reg. Hague Conv. IV, 1907.) (Above not operative unless all parties in war are parties to convention.)

It is forbidden to kill except as a punishment for crime or to treat with inhumanity prisoners of war. They must not be sold into slavery or impressed into the military or naval service of the captor. They must be allowed their personal property of a non-warlike nature, but such property or funds as might facilitate escape or unreasonably interfere with transport or safe custody may be taken possession of temporarily by the captor and restored on their liberation.

The above provisions will not protect subjects of the captor captured while fighting with the enemy. Prisoners who commit crimes or acts punishable according to the ordinary penal or military laws, are subject to the military jurisdiction of the state of the captor. Prisoners of war must not be subjected to avoidable danger and so should not be placed in a noxious or unsanitary situation or one which endangers life or health. The imprisonment of prisoners of war is not penal. It should not, in the absence of misconduct, be punitive or accompanied by indignities, but warrants merely such restraint as is necessary for safe custody. Close confinement is only permissible under exceptional circumstances, as after an attempt to escape or if there is reason to expect such attempt. The captor is charged with the maintenance of prisoners of war and the maintenance, food and clothing should be analogous to the maintenance of his own troops on a peace footing. There is no positive obligation to exchange prisoners. They may be required to work for the benefit of the captor government according to their rank and condition, but not to do military work having direct relation to the war. Sick or wounded prisoners shall be medically treated according to the ability of the captor's medical staff. Prisoners of war may be released upon parole if the laws of their country authorize them to give this parole. If so released, they must scrupulously observe the condition of such

parole and their own government is bound neither to request or accept service inconsistent therewith. The penalty for breach of parole customarily allowed by international law may be capital.

Captivity may be ended by release without parole, release with parole, by successful flight, liberation by the forces of the captive's country or its allies, by exchange of prisoners, by prisoners being brought into neutral territory by the captor, lastly, by the war coming to an end.

EMPLOYMENT OF PRISONERS OF WAR

Prisoners of war may be employed by the captor on work having no direct connection with the operations in the theatre of war, but they may not be employed on works directly connected with the operations of the theatre of war. Work under fire or in situations of especial danger can not be required of them.

FLAGS OF TRUCE

A flag of truce is in its nature of a sacred character, and the use of it to obtain knowledge or information surreptitiously against the interest or wishes of an enemy is to abuse it, and may subject the bearers to detention and, in extreme cases, to punishment as spies. It is forbidden to use the same in bad faith, treacherously or as a stratagem to mislead the enemy. To fire upon or commit acts of violence and hostility against the enemy under cover of a flag of truce is a grave breach of the laws of war and may warrant the most serious reprisals. There is no absolute obligation to receive a flag of truce under all circumstances. If it is exhibited as a token of submission, and if the force exhibiting it desist from all acts of hostility or resistance, firing and attacks on the other side should cease.

POISONING OF WELLS

It is forbidden to poison wells, springs, waters or any kind of food. Also to introduce infectious or contagious diseases for the purpose of injuring an enemy. Except by the Hague Convention, it is not forbidden to drain or destroy the water supply of the enemy in order to overcome or reduce him or to hinder his operations, nor to publicly pollute and foul the same and make it unusable, as by placing the dead bodies of men and animals therein. Such pollution is, however, forbidden by the Hague Convention, Chap. IV, 1907.

Your committee respectfully submit the above as the scant results of a labor but just begun, they having no opportunity to meet or consult until the present assembly of the Society. They further take the liberty to express the opinion that the codification of international law is a labor too vast and too exacting to be undertaken casually in the midst of other employments, even by ripe and accomplished scholars therein; that in their opinion it must be confided to a small commission of competent persons who shall give their whole time thereto and who in justice should be reasonably compensated.

Your Committee asks leave to file the above as a report of progress, subject to modification and to the criticism and suggestion of members after the same has been more fully examined.

Respectfully submitted,

CHAS. NOBLE GREGORY,
AMOS S. HERSHEY,
DAVID JAYNE HILL,
GEORGE A. KING,
CHARLES B. ELLIOTT.

EXHIBIT A

VISIT, SEARCH AND CAPTURE

The American statement of international law on this general subject may be found in the Instructions for the Navy of the United States Governing Maritime Warfare, which was issued on February 8, 1917, before the entry of the United States into the war. By these instructions liability to capture was defined as follows:

ENEMY VESSELS

65. Enemy vessels are liable to capture outside of neutral jurisdiction.

NEUTRAL VESSELS

68. A neutral private vessel is in general liable to capture if she:

(a) Attempts to avoid visit and search by flight, but this must be clearly evident; or resists with violence.

(b) Presents irregular or fraudulent papers, lacks necessary papers, destroys, defaces, or conceals papers.

(c) Is guilty on account of contraband, except when permitted by treaty to surrender ("deliver up," "deliver out") contraband.

(d) Is guilty on account of blockade.

(e) Is guilty on account of unneutral service.

(f) Is under enemy convoy; or fraudulently under neutral convoy.

There are certain exceptions among enemy vessels including cartel-ships, vessels on religious, scientific, or philanthropic missions, hospital ships, vessels exempt by treaty or special proclamation, or small coast fishing vessels. No neutral private vessel is liable to capture by Article 68 without previous visit and search, except in the case where she attempts to avoid visit and search by flight or resists with violence.

The rules for visit and search are given below:

HOSTILE ACTS, VISIT AND SEARCH

12. All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent warships in the territorial waters of a neutral Power, constitute a violation of neutrality and are strictly forbidden.

WHERE AND WHEN EXERCISED

44. The belligerent right of visit and search, subject to exemptions mentioned in Section VII, may be exercised outside of neutral juris-

diction upon private vessels after the beginning of war in order to determine their nationality, the character of their cargo, the nature of their employment, or other facts which bear on their relation to the war.

METHOD OF EXERCISE

45. The right should be exercised with tact and consideration, and in strict conformity with treaty provisions, where they exist.

46. Subject to any special treaty provisions the following procedure is directed.

47. Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (*coup de semonce*), by international flag signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

48. If the summoned vessel takes to flight she may be pursued and brought to, by forcible measures, if necessary.

49. When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.

50. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture she shall be seized and sent in for adjudication.

51. If the papers do not furnish conclusive evidence of the innocent character of the vessel, the cargo, and voyage, or in case of suspicion, the boarding officer shall continue the examination by questioning the personnel or by searching the vessel or by examining her cargo. If such further examination furnishes satisfactory evidence of innocence, the vessel shall be released; otherwise she shall be seized and sent in for adjudication.

52. The boarding officer must record the facts concerning the visit and search upon the log book of the vessel visited, including the date when and the position where the visit occurred. This entry in the log must be made whether the vessel is held or not.

53. . . . The evidence furnished by the papers against a vessel is conclusive. Regularity of papers and evidence of the innocence of cargo or destination furnished by them are not necessarily conclusive, and if doubt exists a search of the ship or cargo should be made to establish the facts. If a vessel has deviated far from her direct course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers.

Following visit (and if necessary search) the rules for disposition are as stated in Articles 50 and 51 quoted above, *i. e.*, seizure and sent in for adjudication, and also as given in Articles 80 to 83 inclusive:

80. The act of capture shall be signified by hoisting the United States flag on board the vessel seized.

81. In case the prize is an enemy vessel, the flag of the United States shall be flown at the usual place (peak or staff) over the enemy flag.

82. If the prize is a neutral vessel, the neutral flag shall be flown as usual until she is adjudged to be a lawful prize by a competent court; the flag of the United States, however, shall be exhibited at the fore to indicate that she is for the time in the possession of officers of the United States.

83. Whenever the colors are displayed the procedure of the two preceding articles shall be followed thereafter during the passage of the prize to the United States port and while under the control of the prize-master in such port.

The case of destruction of prizes is given in Articles 104 to 109 inclusive:

104. Since title to a captured enemy vessel vests in the captor's government by virtue of the fact of capture, enemy ships made prizes may be destroyed in case of military necessity by the capturing officer when they can not be sent or escorted in for adjudication.

105. The responsibility of the officer ordering the destruction exists solely to his own government, except in so far as the interests of the owners of neutral cargo on board the prize are concerned. If circumstances permit, it is preferable to appraise and sell the prize rather than to destroy it. This is permitted by Section 4615, Revised Statutes, already quoted.

106. Before destroying an enemy prize, the safety of the personnel on board and, if practicable, of their personal effects must be ensured, and all the documents and papers of the prize mentioned in Section 4615, Revised Statutes, shall be taken on board the capturing vessel of war and be inventoried and sealed in accordance with the procedure of that section for delivery to the prize court, with especial view to the protection of the interests of the owners of innocent neutral cargo on board, if such exists.

NEUTRAL PRIZES

107. In general, if neutral prizes can not be sent or escorted in for adjudication they should be released. This instruction is not made absolutely mandatory, because neither by international law nor by the statutes of the United States is the destruction of neutral prizes forbidden. The responsibility of the capturing officer for the destruction of a neutral prize is, however, so serious that he should never order such destruction without being entirely satisfied that the military reasons therefor justify it under circumstances such that the prize can neither be sent in nor, in his opinion, properly released.

108. In the exceptional case of the destruction of a neutral prize, before such destruction takes place, the safety of all persons on board the prize and as far as conveniently possible the security of their personal effects must be ensured. Likewise all the vessel's papers and

other documents which those interested consider relevant and which are necessary for a decision by the prize court as to the validity of the capture shall be secured by the captor to be forwarded to the court.

REPORT OF DESTRUCTION OF PRIZE

109. Every case of destruction of prize shall be reported to the Navy Department at the earliest practicable moment.

From these rules, either by mandatory statement or a statement of a prohibitive nature, or else by inference, the following general principles emerge:

(a) In general the making a prize of the vessel must be preceded by a visit, supplemented by search if necessary.

(b) The visit and search must be accomplished under certain formalities and also under certain restrictions as to the numbers of the visiting personnel and their equipment with arms.

(c) When probable cause for capture is found the usual and proper course is to send the detained vessel in for adjudication with a prize crew in charge or else under convoy.

(d) No provision is made for any rules recognizing a right to send vessels into port for examination. The evident intent of the rule being that such an examination should take place on the high seas.

(e) Destruction without visit is unauthorized.

(f) Destruction after visit and the discovery of probable cause is recognized as permissible under certain circumstances.

(g) Destruction of enemy prize is more permissible than destruction of neutral prize.

(h) In any case the safety of the lives of the persons on board the captured vessel must be assured and the ship's papers must be saved.

The entire body of rules contemplates an orderly adjudication by a competent court and not a hasty and final adjudication by the officer making the capture at the time thereof.

Chairman LANSING. I do not know what the pleasure of the meeting is as to taking any action on the subcommittees' reports, but it is provided that action shall be taken upon them, I think, by tomorrow morning. I assume that these subcommittees report to the general committee and that the general committee will act before the subcommittee's reports go to the Society.

(The Chairman at this point read a letter from the Committee on Commerce, Trade and Commercial Law of the American Bar Association inviting the members of the Society to attend a public meeting of the committee in New York, May 2-4, next, and take part in the discussions.)

Chairman LANSING. The next in order is the report of Subcommittee No. 2. In the absence of Dr. Judson, who, I understand, was obliged to leave today, the report will be read by another member of the subcommittee, Admiral Charles H. Stockton.